ORIX New Zealand Ltd v Milne

High Court Auckland CIV 2005-404-4394
27, 28, 29, 30 November, 1 December 2006; 17 May 2007
Rodney Hansen J

Commercial law – Guarantee – Company principal guaranteeing loans to purchase machines – Ownership transferred to company within same group with lender's consent – Whether lender estopped from enforcing guarantees.

Commercial law – Personal property securities – Registered security interest over paving machine – Machine onsold – Whether sale by seller in ordinary course of business of seller – Personal Property Securities Act 1999, s 53.

Tort – Duty of care – Accountant employed by group of companies – Whether owed duty of care to principal to ensure loans repaid.

ORIX sued Mr Milne to enforce his guarantees given in support of loans by ORIX to Mr Milne's companies for the purchase of paving machines. Mr Milne claimed that ORIX was effectively estopped from enforcing its guarantees against him because ORIX had agreed to the transfer of the machines to another company in the same group. Mr Milne in turn joined the third party, Mr Johnson, claiming that Mr Johnson, as the accountant employed by the companies, owed him a duty of care to ensure that the proceeds of sales of machines were applied to repaying the ORIX loans. ORIX sued T C Nicholls Ltd to recover one of the machines purchased with an ORIX loan and over which ORIX had registered a security interest. The issues for the Court were: (1) Was Mr Milne bound by his guarantees? (2) Did Mr Johnson owe Mr Milne a duty of care?; and (3) Did T C Nicholls Ltd acquire the paving machine by sale in the ordinary course of the business of the seller within the scope of s 53 of the Personal Property Securities Act 1999 (the PPSA), thus defeating ORIX's security?

Held: 1 ORIX was entitled to enforce the guarantees. ORIX had never conveyed to Mr Milne that he was released from his guarantees by the transfer of ownership of the machines and its agreement to that transfer could not possibly have conveyed that intention (see para [13]).

2 Mr Johnson did not owe Mr Milne a duty of care. He had been employed by the companies, not by Mr Milne, and had done nothing to assume responsibility for protecting his interests. In any event, he was not the cause of the loss: Mr Milne had known how the proceeds of sales were being used and should have taken steps himself to ensure that they were paid to ORIX (see paras [25], [36]).

3 T C Nicholls Ltd was entitled to retain the machine it had bought. As between the two companies within Mr Milne's group of companies which had successively owned the machine onsold to T C Nicholls Ltd, it was the first company that had been the seller for the purposes of s 53 of the PPSA and it

did not matter that it was not the owner of the machine at the time it was sold to T C Nicholls Ltd. On the evidence the first company was in the business of selling paving machines at the time of the sale to T C Nicholls Ltd, and the fact that those sales were made infrequently and were only a small part of its business did not detract from that conclusion. Further, it was a sale in the ordinary course of that business: the way in which the deal was negotiated, agreed and implemented was unremarkable and everything pointed to a straightforward deal in the mainstream of the company's business. It did not matter that T C Nicholls Ltd was a trade buyer: a trade buyer was extended the same protection as an ordinary member of the public as long as the goods were bought in the ordinary course of the seller's business (see paras [54], [70], [71], [72]).

Result: Judgment entered against the first defendant.

Cases mentioned in judgment

Alberta Pacific Leasing Inc v Petro Equipment Sales (1995) 10 PPSAC (2d) 69; 34 Alta LR (3d) 66.

Attorney-General v Carter [2003] 2 NZLR 160 (CA).

Brownie Wills v Shrimpton [1998] 2 NZLR 320 (CA).

Burbery Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd [1989] 1 NZLR 356 (CA).

Camco Inc v Frances Olson Realty (1979) Ltd [1986] WWR 258; (1986) 50 Sask R 161.

Fairline Boats Ltd v Leger (1980) 1 PPSAC 218 (Ont:HC).

547592 Alberta Ltd (Receivership), Re (1995) 13 PPSAC (2d) 62 (Alta:QB).

Gartside v Sheffield, Young & Ellis [1983] NZLR 37 (CA).

Gillies v Keogh [1989] 2 NZLR 327 (CA).

Henderson v Merrett Syndicates Ltd [1995] 2 AC 145; [1994] 3 All ER 506.

MacDonald v Canadian Acceptance Corp Ltd [1955] 5 DLR 344; [1955] OR 874.

Northwest Equipment Inc v Daewoo Heavy Industries America Corp (2002) 1 Alta LR (4th) 14; [2002] 6 WWR 444.

Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd [2005] 1 NZLR 324 (CA).

Royal Bank of Canada v 216200 Alberta Ltd (1986) 33 DLR (4th) 80; 51 Sask R 146.

South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd [1992] 2 NZLR 282 (CA).

White v Jones [1995] 2 AC 207; [1995] 1 All ER 691.

Action

This was an action by ORIX New Zealand Ltd to enforce guarantees entered into by Roger John Anthony Milne, the first defendant, who joined Callum Scott Johnson as a third party, and against T C Nicholls Ltd, the second defendant, to recover property subject to a security interest.

H H Ifwerson for ORIX.
M J Russell and *J M Watkins* for Mr Milne.
B A Fletcher for Nicholls.
M C Josephson and *M K Beight* for Mr Johnson.

Cur adv vult

RODNEY HANSEN J. [1] The plaintiff, ORIX New Zealand Ltd (ORIX), made loans to a company, Comquip Ltd (Comquip), to enable it to purchase three paving machines. The loans were guaranteed by the first defendant (Mr Milne), who was the sole shareholder of Comquip. Comquip transferred the machines to a related company, Pavement Technology Ltd (Pavement), of which Mr Milne was also sole shareholder. They were then sold to third parties. The proceeds of sale were not, however, paid to ORIX. They were used to pay other creditors. Comquip and Pavement failed to maintain loan repayments. Comquip went into liquidation and Pavement was struck off the register. ORIX now sues Mr Milne under the guarantees to recover the outstanding balances.

[2] Mr Milne maintains he was released from the guarantees when the machines were transferred from Comquip to Pavement. If he is liable to ORIX, he claims an indemnity from the third party (Mr Johnson), an accountant who was contracted to Comquip and Pavement. Mr Milne blames him for the failure of the companies to account to ORIX for the proceeds of sale of the machines.

[3] ORIX also seeks to recover one of the machines from a purchaser, the second defendant T C Nicholls Ltd (Nicholls). When Nicholls bought the machine, it failed to ascertain that ORIX had registered its security under the Personal Property Securities Act 1999 (the PPSA). ORIX relies on this registered security. Nicholls says it is protected because the machine was sold to it in the ordinary course of business.

[4] The issues I am required to consider are therefore:

(a) Whether Mr Milne is bound by the guarantees.
(b) If so, whether Mr Milne is entitled to indemnity from Mr Johnson.
(c) Whether ORIX can rely on its registered security to recover the machine sold to Nicholls or whether there was a sale in the ordinary course of business which protects Nicholls against recovery.

Claim against Mr Milne

[5] At the time the loans were made Comquip was in the business of selling pavement and milling machines on behalf of overseas agencies. It also owned machines that it hired to Pavement, which undertook paving contracts.

[6] Comquip first approached ORIX for finance to purchase a paving machine in November 2001. An advance was made for the purchase of a Bitelli milling machine, model SF102C (the Bitelli SF102C machine). That loan is not directly in issue. The third party, to whom the machine was sold, paid ORIX the outstanding balance.

[7] The first of the loans directly in issue was for $118,360 and was made on 17 September 2002 for the purchase of a Bitelli BB632 asphalt paver (the Bitelli BB632 paver). The second loan in issue of $118,018 was made on 17 February 2003 for the purchase of a Marini asphalt paver (the Marini paver). Both loans were repayable by equal monthly instalments of principal and interest over a period of five years.

[8] On 30 June 2003 Comquip transferred seven paving machines to Pavement, including the three bought with the assistance of the ORIX loans. The transfers were effected by entry in the books of both companies. The transfer was made for the stated purpose of moving into Pavement the business of hiring milling and paving equipment, leaving Comquip to concentrate on the sale of spare parts and rubber tracks.

[9] Mr Johnson said he advised ORIX of the transfers in a telephone call to a member of its staff. He told the person that Mr Milne owned all of the shares in both companies. On that basis he was advised that there was no need to document the change; Mr Milne's personal guarantee would remain in place. Changes were made to the bank authorities by which automatic monthly payments were made.

[10] Mr Johnson could not remember the name of the staff member of ORIX to whom he spoke. He said he had been referred to her by the person at ORIX with whom he liaised on insurance issues. ORIX personnel habitually recorded contacts with clients but, without identification of the staff member, could not verify that there had been a communication from Mr Johnson. However, generally I found Mr Johnson a careful and truthful witness, and I accept his evidence on this issue.

[11] Ms Russell submitted that ORIX's agreement to the transfer of the security from Comquip to Pavement and its acceptance of payments from Pavement gave rise to an estoppel which prevents it relying on the guarantee. She argued that its conduct amounted to a representation that it would release both Comquip and Mr Milne from their obligations under the loan agreements.

[12] For an estoppel to arise that would release Mr Milne from his obligations under the guarantee, he would have to show that he was led to believe by the words or conduct of ORIX that it would not enforce the guarantee; that he had acted in reliance on what ORIX said or did; and that it would be unconscionable for ORIX to be permitted to resile from its position: *Burbery Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356 (CA) and *Gillies v Keogh* [1989] 2 NZLR 327 (CA).

[13] These requirements have plainly not been met. ORIX never conveyed to Mr Milne that it was releasing him from his obligations. Indeed, there was no communication between ORIX and Mr Milne at all at the material time. ORIX's actions could not, in any event, have been understood to represent that Mr Milne would not be personally liable. Its agreement to the transfer of the security from one company in the group to another could not possibly convey that intention. Self-evidently there were no acts in reliance and nothing unconscionable about what occurred. The defence of estoppel must fail.

[14] Mr Milne is accordingly liable under his guarantees. It is not disputed that, as at the date of default, ORIX was entitled to recover the sum of $143,410.31 and to interest from that date at the default rate specified in the contract of 14.3 per cent.

Claim by Mr Milne against Mr Johnson

Background

[15] From April 2003 to March 2005 Mr Johnson was employed as the financial manager of Comquip and Pavement and two other companies in which Mr Milne had a 60 per cent shareholding, Frimokar (NZ) Ltd and Frimokar (Australia) Pty Ltd. Peter Rowell owned the remaining 40 per cent of the shares in the Frimokar companies. Mr Johnson was employed through an agency to whom he was contracted which, in turn, contracted his services to the four companies. Mr Johnson worked closely with Mr Milne. They occupied adjoining offices and, except during the absence of one or the other overseas, they were in daily contact.

[16] Mr Milne claims that Mr Johnson owed him a duty of care as the guarantor under the chattels mortgages. He alleges Mr Johnson breached the duty by failing to:

(a) obtain ORIX's consent to the transfer of the secured machines from Comquip to Pavement;
(b) ensure the transfer and completion of documentation of the transfer; and
(c) ensure the payment of the sums owing to ORIX under the chattel mortgages for the Bitelli BB632 and Marini machines.

[17] I have already found that Mr Johnson did obtain ORIX's agreement to the transfer of the machines to Pavement. He also took the necessary steps to effect the transfer of the machines (and their associated liabilities) in the accounts of Comquip and Pavement. I was not told what further steps he should have taken to effect the transfers. It could not be suggested that he was under an obligation to bring about a release of the guarantees. The substantial case against Mr Johnson therefore, and the focus of evidence and argument, was his failure to account to ORIX from the proceeds of sale of the two machines, thereby leaving Mr Milne exposed to liability under his personal guarantee.

The two sales

[18] The Marini paver, secured by the second loan agreement, was sold to Nicholls in December 2003 and delivered in February 2004. The sale price of $155,000 plus GST was paid to Pavement. Most of the funds were transferred to other companies in the group – $120,000 to Frimokar companies and $50,000 to Comquip. $10,646 was paid to ORIX to bring payments up to date under the loan agreement. The rest was used to pay wages and unsecured creditors.

[19] In June 2004 the Bitelli BB632 paver was sold to Shaw Asphalters Ltd of Hamilton for $112,859.78 plus GST. It was invoiced by Comquip, which received the proceeds of sale. Nothing was paid to ORIX. Most of the money – $72,574 – was used as a deposit on a Marini paver, which Comquip had committed to import from Italy at a total cost of $330,000. The balance of the purchase price was borrowed from Marac Finance.

[20] Mr Milne said that he instructed Mr Johnson to pay ORIX the outstanding balance owed to it from the proceeds of sale of both machines. He said he did not find out that the loans had not been repaid until April 2005 and was shocked by the news. Mr Johnson denies this. He said Mr Milne was well aware that the ORIX debts were not repaid. He said he provided Mr Milne with monthly management accounts which disclosed the indebtedness to ORIX.

[21] I accept Mr Johnson's evidence. I do not believe Mr Milne gave any instructions to Mr Johnson as to how the proceeds of sale should be disbursed. If such a direction was given, I can think of no reason why Mr Johnson would have ignored it. Mr Milne denied receiving monthly management accounts but I have no doubt they were provided to him and that they disclosed that the debts to ORIX remained outstanding. Mr Rowell, Mr Milne's partner in the Frimokar businesses, gave unchallenged evidence that Mr Johnson produced monthly accounts for Frimokar in a timely manner. It is inconceivable that Mr Johnson would not have provided the same service to Mr Milne in relation to Comquip and Pavement. I am satisfied that Mr Milne knew, or had the means of knowing, that the debts to ORIX had not been paid.

[22] I heard a great deal of evidence about the sale in December 2004 of most of the remaining assets in Pavement to a firm called Higgins. They included the machine that was the subject of the first loan agreement with ORIX, the Bitelli SF102C machine. Again, the principal was not repaid. As earlier

mentioned, this was not part of the claim because Higgins agreed to pay ORIX the amount outstanding. This transaction, and a contemporaneous sale of Comquip's undertaking, was relied on as further evidence of Mr Johnson's negligence. He preferred other creditors, including a supplier owed almost $400,000 who held the debenture over both companies. It is unnecessary for me to analyse this transaction in any detail as it has no bearing on the issues which remain for consideration. The first is whether Mr Johnson owed a duty of care to Mr Milne that he breached by failing to pay the ORIX debts when the securities were disposed of.

Duty of care

[23] The question of whether Mr Johnson owed Mr Milne a duty of care is to be determined by reference to the two-stage approach endorsed in *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) and *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA). In deciding whether, in the light of all the circumstances of the case, it is just and reasonable that a duty of care should be imposed:

> "The focus is on two broad fields of inquiry but these provide only a framework rather than a straitjacket. The first area of inquiry is as to the degree of proximity or relationship between the parties. The second is whether there are other wider policy considerations that tend to negative or restrict or strengthen the existence of a duty in the particular class of case." (*Rolls-Royce* at para [58] per Glazebrook J, giving the judgment of the Court.)

[24] Among the factors identified by Glazebrook J at paras [58] – [65] as relevant to an inquiry into proximity are:

(a) the nature of the relationship between the parties;
(b) the degree of analogy with cases in which duties have been held to exist;
(c) the nexus between the negligence and the loss;
(d) the vulnerability of the plaintiff;
(e) the availability of other remedies; and
(f) the nature of the loss.

[25] The nature of the relationship between the parties does not support the existence of a duty. Mr Johnson was employed by the companies, not by Mr Milne. Plainly, he owed the companies a duty to act with reasonable competence but under his contract of employment he owed no such duties to company shareholders or directors.

[26] Nor is there anything to suggest that Mr Johnson was asked to assume responsibility for the interests of Mr Milne or voluntarily assumed such an obligation. Arguably, as Mr Josephson submitted, it would have been contrary to the interests of his employers – the companies – for him to have done so. There was a potential conflict between the interests of Comquip and Pavement, as primary debtors, and Mr Milne, as guarantor.

[27] An assumption of responsibility is generally required before a duty will be imposed in cases of negligent omission to act (see the discussion of Tipping J in *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 (CA) at p 328). Of the cases cited to me, *Brownie Wills* provides the closest analogy to the facts of the present case. Brownie Wills was a firm of barristers and solicitors who acted for a company which was indebted to a bank. The firm was instructed by

the bank to act on its behalf as well as for the company to obtain the directors' signatures to a guarantee for the company's debt. One of the directors, who was not a client of Brownie Wills, signed the guarantee without seeking or receiving advice from Brownie Wills. The Court of Appeal held that, in the circumstances, there was an insufficient closeness of relationship or proximity to found a duty of care.

[28] I find *Brownie Wills* to provide a closer analogy to the present case than the authorities relied on by Ms Russell, in particular, *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 and *White v Jones* [1995] 2 AC 207. The former involved a voluntary assumption of responsibility under an agency agreement and the latter is one of the will cases that appear to be sui generis and distinguishable, as Cooke J said in *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 at p 42 and as is discussed in the judgment of Gault and Blanchard JJ in *Brownie Wills* at pp 325 – 326.

[29] Other considerations referred to in *Rolls-Royce* also tell against a finding of sufficient proximity. There was not a close nexus between the actions of Mr Johnson and the loss suffered by Mr Milne. As I will explain in more detail later, Mr Milne's exposure under the guarantee has to be seen in the context of a failing business that he was solely responsible for managing. Mr Milne was not at all vulnerable. On the contrary, he was well placed to avoid the very loss of which he complains. He was aware of the risks to which he was exposed by his guarantees and was in a position to manage them. Finally, his loss was economic, a class of case in which the Courts have generally been less willing to impose a duty of care (*Rolls-Royce* at para [63] and *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 at p 299).

[30] Policy considerations point the same way. I agree with Mr Josephson that it would be a long step indeed to impose a duty of care on an employee in circumstances where that duty could run counter to the primary duty owed to his or her employer.

[31] For these reasons, which I have not found necessary to expound at length, I am satisfied that it would not be fair, just and reasonable to impose a duty of care on Mr Johnson in this case.

Causation and loss

[32] Even if I had found a duty to exist and that Mr Johnson's failure to repay ORIX on the sale of the machines was a breach of the duty, Mr Milne's claim would have foundered for other reasons. He has not established that Mr Johnson's actions caused his losses. I believe Mr Milne knew full well what Mr Johnson was doing. The two worked closely together, in adjoining offices and in close proximity. I have already found that Mr Milne received monthly management accounts from Mr Johnson which would have disclosed that the ORIX debts remained outstanding. I am satisfied that he knew in general terms how Mr Johnson allocated funds from assets sales and knew that ORIX had not been paid.

[33] Throughout the period April 2003 – April 2005 that Mr Milne was employed, Comquip and Pavement experienced ongoing cash-flow problems. Mr Milne said phone calls from creditors asking for payment were a daily occurrence. One of the more demanding aspects of his job was to find the money to keep creditors happy. To begin with he was able to achieve this by inter-company transfers of funds, including from the Frimokar companies. This lasted until Mr Rowell was no longer prepared to inject funds.

[34] The financial position of Comquip and Pavement deteriorated dramatically during the 2004 – 2005 financial year, leading to the sale of most of the remaining assets in December 2004. There was insufficient to pay creditors. At the date of the hearing the liquidator of Comquip had not processed all proofs of debt but expected the shortfall to be $400,000 – $500,000. Pavement had earlier been struck off, leaving unpaid creditors of an unknown amount.

[35] Mr Milne's personal exposure was substantial. He had a number of personal guarantees in addition to ORIX, among them the Marac debt of $270,000 for the new Marini paver and the account of Comquip's main supplier, who had a debenture over the company and was eventually repaid almost $400,000 from asset sales.

[36] Mr Milne's fortunes were inextricably tied in with those of the companies. He owed Comquip over $750,000 at 31 March 2004, an increase of $600,000 since 31 March 2003. The reason for this was never satisfactorily explained and the absence of final accounts for 31 March 2005 made it difficult to form a clear picture of what happened during that final tumultuous year. What is clear, however, is that the ORIX guarantees were a relatively small part of Mr Milne's burgeoning financial difficulties. He ended up with personal exposure because his company suffered losses for which he, as director, must take responsibility. He lost the confidence of his business partner, who had helped to prop up the company. Of direct relevance, he entrusted Mr Johnson with primary responsibility for disbursing funds from asset sales, took no steps to direct or correct the decisions Mr Johnson made and then sought to make him responsible for the consequences.

[37] Mr Milne has seen the mote in Mr Johnson's eye but not the beam in his own. He must accept the consequences of his own actions. Mr Johnson did not cause his losses.

Claim against Nicholls

Background

[38] As earlier mentioned, a Marini paver was sold to the second defendant, Nicholls, in December 2003. Nicholls did not know that it was secured to ORIX and relies on s 53 of the PPSA to protect it against ORIX's claim to enforce its registered security. Section 53 provides:

> **53. Buyer or lessee of goods sold or leased in ordinary course of business takes goods free of certain security interests –** (1) A buyer of goods sold in the ordinary course of business of the seller, and a lessee of goods leased in the ordinary course of business of the lessor, takes the goods free of a security interest that is given by the seller or lessor or that arises under section 45, unless the buyer or lessee knows that the sale or the lease constitutes a breach of the security agreement under which the security interest was created.
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> (2) This section prevails over section 3 of the Mercantile Law Act 1908 and section 27 of the Sale of Goods Act 1908 where this section applies and either or both of those sections apply.

[39] If the machine was sold to Nicholls in the ordinary course of business of the seller, Nicholls will take it free of ORIX's security interest, as it is accepted that Nicholls did not know that the sale constituted a breach of the security agreement.

Identity of seller

[40] The question of who sold the machine to Nicholls is complicated by the earlier transfer of the machine from Comquip to Pavement. It was one of the seven machines transferred from Comquip to Pavement in June 2003 for what I accept to have been the bona fide purpose of rationalising the operations of the two companies. The transfer had the purpose of separating the activities of Comquip so that it would primarily operate as an importer and wholesaler of rubber tracks and spare parts while Pavement operated as a contractor of milling and paving machines. The decision was made in order to separate the streams of revenue and expenses for the two activities which had previously gone through Comquip, and to make it easier to sell one or both businesses at a later date.

[41] The transfer was effected by entries in the books of both companies. The sale price was the value of the machines. No cash changed hands. The transfer was reflected in the advance accounts of the two companies.

[42] Mr Fletcher, for Nicholls, submitted that Pavement did not become the owner of the machines (and could not have been the seller to Nicholls) because there was no contract of sale and because cl 27 of the security agreements prohibited the sale of the machines without the written consent of ORIX which was not given. I do not accept that submission. Plainly, transfer was effected pursuant to an agreement, albeit as a result of a decision by the common director of two related companies. The transfers may have been in breach of the security agreements with ORIX, but that did not invalidate the sale process. Pavement was accordingly the owner of the Marini paver when it was sold to Nicholls. But was it the seller?

[43] Tony Nicholls, a director of Nicholls, gave evidence of the sale and purchase transaction. He said that Nicholls carries out paving contract work and decided in late 2003 that it needed to increase its operational capacity in that area. Mr Nicholls contacted Comquip. It was the New Zealand agent for the Italian company that manufactured Marini pavers. He initially spoke on the telephone to Mr Milne, who referred him to a Comquip employee, Don Tapp.

[44] Mr Tapp wrote to Mr Nicholls on 22 December, enclosing technical information and specifications for the Marini paver. The letter was written on Comquip's letterhead. The letter said in part:

> "As a starting point the specification is the same as the unit in New Zealand owned by Comquip/Pavement Technology and now in Wellington."

[45] In February 2004, Mr Nicholls went to Wellington to view the paver. He had discussions with Mr Tapp and decided to purchase it. The proposed terms were confirmed in a letter faxed to Mr Nicholls shortly afterwards. Again, it was on a Comquip letterhead and signed "Don Tapp, for Comquip Ltd". It set out the purchase price and delivery arrangements. Payment was stipulated to be cash on delivery. It asked Mr Nicholls to sign his acceptance on the letter and to return it to Comquip. He did so on 19 February 2004.

[46] Nicholls received an invoice dated 23 February from Pavement. Mr Nicholls paid Pavement Technology by cheque on 27 February and took delivery of the paver. He said he was aware that Pavement and Comquip were related companies, but had no other knowledge or previous dealings with Pavement. He had no reason to be concerned about the matter, until told in June 2005 that the paver was subject to a security interest to ORIX.

[47] Mr Nicholls said that he had been in the contracting business and involved in asphalt-laying for some 10 – 12 years and in the construction and surfacing industry for 36 years. He had previously bought contracting equipment, including an asphalt-laying machine. Mr Nicholls said he had known Mr Milne for some 20 years. He said Mr Milne and his companies have always sold pavers and then became involved in milling machines. He knew that Comquip had held the agency for Bitelli asphalt pavers. After the agency was transferred to another firm, he learnt that Comquip had taken over the distributorship of Marini pavers and equipment. He referred to extracts from the Yellow Pages for 2002 and 2003 confirming that Comquip held itself out as in the business of selling and distributing paving machines as well as milling machines and rubber tracks.

[48] For Nicholls it was submitted that the evidence established that Comquip was the seller for the purpose of s 53. For ORIX it was argued that Pavement, as the owner of the paver, was the seller.

[49] Neither of the terms "seller" or "sale" are defined in the PPSA. As s 53 is concerned with goods (and none of the other species of personal property defined in the PPSA), it is logical to look to the Sale of Goods Act 1908 (the SOG Act) for guidance.

[50] By s 2 of the SOG Act a "seller" means "a person who sells or agrees to sell goods". A sale and an agreement to sell are defined in s 3 of the SOG Act, which provides:

> **3. Sale and agreement to sell –** (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called "the price".
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> (2) There may be a contract of sale between one part owner and another.
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> (3) A contract of sale may be absolute or conditional.
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> (4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called "a sale"; but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called "an agreement to sell".
>
> (5) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

[51] The February contract between Comquip and Nicholls was clearly a contract of sale under s 3(1). Whether it was a sale for the purpose of s 3(4) will depend on whether property passed under the contract of sale. That is determined by s 19 of the SOG Act, which provides:

> **19. Property passes when intended to pass –** (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

[52] Section 20 of the SOG Act sets out rules for ascertaining intention, and relevantly provides:

> **20. Rules for ascertaining intention –** Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:
>
> Rule 1. Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, is postponed.

[53] The February agreement between Comquip and Nicholls was an unconditional contract for the sale of specific goods (goods identified and agreed on at the time the contract of sale was made as defined in s 2 of the SOG Act) in a deliverable state. Accordingly, property passed to Nicholls when the contract was made, notwithstanding postponement of payment and delivery. No different intention appeared from the contract.

[54] It follows that in terms of s 3(4), the February contract was a sale and Comquip was the seller. The fact that Pavement and not Comquip was the owner of the goods does not affect the position. Goods which are sold under a contract of sale do not have to be owned by the seller (ss 7(1) and 23 of the SOG Act).

[55] This analysis is generally in line with the approach of the North American Courts (see, for example, *Royal Bank of Canada v 216200 Alberta Ltd* (1986) 33 DLR (4th) 80 and the discussion in Gedye, Cuming, and Wood (eds), *Personal Property Securities in New Zealand* (2002), section 53).

[56] Ms Ifwersen sought to persuade me that, notwithstanding the parties to and terms of the February agreement, Pavement was the seller for the purpose of s 53 of the PPSA. First, she argued it was an implied term of the February agreement that Nicholls would pay Comquip for the paver; that the parties subsequently varied the agreement to provide for payment to Pavement; and that as a result of this variation the Comquip agreement came to an end and a new agreement was entered into between Pavement and Nicholls.

[57] That argument cannot stand against my finding that there was a sale in February, subject only to delivery and payment. The fact that Comquip, in effect, directed payment to Pavement could not affect the position. The contractual rights and obligations continued to reside in Comquip.

[58] Next, Ms Ifwersen pointed out that Mr Nicholls was aware that Pavement had some kind of interest in the paver. The letter sent to him on 22 December 2004 referred to ownership by "Comquip/Pavement Technology". Mr Nicholls acknowledged in cross-examination that he knew the Marini paver sold to him had been hired out through Pavement.

[59] That information may have suggested to Mr Nicholls that Pavement had an interest in the paver but it was not for him to speculate on the nature of the relationship between Comquip and Pavement. He was dealing with Comquip, which held itself out as owner or as authorised to sell the paver. The evidence does not suggest that Nicholls intended to contract with Pavement and not Comquip.

[60] Ms Ifwersen then sought to invoke the provisions of the Goods and Services Tax Act 1985 (the GST Act). She submitted that, as Pavement issued the invoice for the Marini paver, it was the supplier for the purpose of the Act and must therefore have been the seller for the purpose of the PPSA. I also

reject that argument. The GST Act is a self-contained code. The concept of supply and the meaning of supplier are peculiar to the statute. The GST legislation is of no assistance in determining who was the seller under the PPSA.

[61] Finally, Ms Ifwersen sought to rely on the subsequent conduct of Mr Nicholls, in particular, an acknowledgment he made to the solicitor acting for ORIX that he had bought the Marini paver from Pavement. She said this could be taken into account for the purposes of resolving factual disputes as to the existence of contractual terms. In my view, there can be no dispute as to the contractual terms or the parties to the contract, but even if there were, Mr Nicholls' opinion on a question of law can be of no assistance.

Ordinary course of business

[62] The remaining issue is whether the sale was in the ordinary course of business of the seller. The phrase "in the ordinary course of business" has frequently been considered by the Courts in New Zealand but in different legislative contexts and without the additional words "of the seller" which appear in s 53. They require a focus on the business of the seller in each case. The North American cases which consider the identical phrase in personal property security legislation provide the best guidance (see the discussion in Gedye at section 53).

[63] One of the leading cases, *Camco Inc v Frances Olson Realty (1979) Ltd* [1986] WWR 258 (Sask:CA) discusses s 30(1) of the Personal Property Security Act SS 1979 – 1980 (since replaced by the Personal Property Act SS 1993), which provides in s 30(2):

> (2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest therein given by or reserved against the seller or lessor or arising under section 29, whether or not the buyer or lessee knows of it, unless the secured party proves that the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement.

[64] In discussing what a sale of goods in the ordinary course of business of the seller is, Tallis JA said at p 276:

> "Since the question whether a buyer is a buyer under s 30(1) is a question of fact, I would not attempt to articulate an all inclusive definition of what is a sale of 'goods . . . in the ordinary course of business of the seller'. I do, however, hold that the trier of fact should consider whether the person was a person in the business of selling goods of that kind and whether the transaction(s) took place in the ordinary course of that business. And in my opinion the court should give a generally liberal interpretation to the phrase 'buyer . . . of goods sold . . . in the ordinary course of business of the seller', in order to carry out the purpose of s 30(1) – to protect the buying public in cases where the secured party furnishes goods which are sold to the public by the debtor in the regular course of the debtor's business. This comports with the underlying philosophy of the provision to protect the security interest so long as it does not interfere with the normal flow of commerce."

[65] In *Royal Bank of Canada v 216200 Alberta Ltd* Vancise JA, giving the judgment of the Court, said at p 87:

> "In my opinion, a sale, in the ordinary course of business, includes a sale to the public at large, of the type normally made by the vendor in a particular business where the basic business dealings between buyer and seller are carried out under normal terms and consistent with general commercial practice. It does not include private sales between individual buyers."

[66] As the discussions in these judgments indicate, a two-step process will generally be warranted. The first is to determine the business of the seller. The second is to inquire whether the sale was made in the ordinary course of that business.

[67] I am satisfied that Comquip was in the business of selling pavers at the time of the sale to Nicholls. Ms Ifwersen submitted that it had ceased to be in the business after transferring its stock of pavers to Pavement in June 2003. She argued that at that time a decision was made to move to Pavement that part of Comquip's business which included the sale of pavers.

[68] The evidence suggests to me, however, that the transaction did not greatly affect the nature of Comquip's business. The change to the way the business activities of Comquip and Pavement were accounted for was not reflected in their actual operation. The two companies operated together, sharing staff and administration. Comquip retained the Marini agency. It continued to hold itself out as in the business of dealing in pavers. Mr Nicholls' evidence makes that clear (see, in particular, para [47] above). The sale of the Bitelli BB632 paver in June 2004 was also effected by Comquip (see para [19] above). It rendered the invoice for that machine and received payment, although Pavement had owned the machine since June 2003.

[69] The way in which sale transactions were accounted for in the books of the two companies was essentially an internal administrative matter. It did not reflect the way in which the companies carried on business and how they were perceived by the business community. The evidence before me indicated that Comquip (to the extent its activities were outwardly distinguishable from those of Pavement) carried on business much as before. Whether as principal or agent, it was in the business of selling paving machines.

[70] The fact that sales were made infrequently and were only a small part of Comquip's business does not affect this conclusion. The circumstances are analogous to those in *Alberta Pacific Leasing Inc v Petro Equipment Sales* (1995) 10 PPSAC (2d) 69 where the sale by a company of a crane was held to be in the ordinary course of its business, although it was the only sale that occurred in the course of a year. The company was in the business of leasing cranes that it sold when they became obsolete or difficult to hire. The Court said that if the company deemed a sale to be in its greater economic interest, it was appropriate to treat it as a sale in the ordinary course of business.

[71] The next question is whether the sale of the paver took place in the ordinary course of Comquip's business. The evidence establishes to my satisfaction that it did. The lead-up to the sale had all of the hallmarks of a normal trade transaction. Nicholls was a user of paving machines who approached Comquip as a reputable and established dealer. The way in which the deal was negotiated, agreed and implemented was unremarkable. Everything points to a straightforward deal in the mainstream of Comquip's business.

[72] Ms Ifwersen referred me to *Fairline Boats Ltd v Leger* (1980) 1 PPSAC 218 in which Linden J said at p 222 that if the buyer is an ordinary consumer, the likelihood of his being involved in the sale in the ordinary course of business is greater. She submitted that Nicholls was not an ordinary consumer, but an experienced player in a very specialised industry to whom the protection of s 53 should not extend. But I take the view that in the paving machine market, Nicholls was an ordinary consumer who went to Comquip as a dealer in the machines it wanted to acquire. Section 53 does not differentiate between classes of consumers depending on the size of the market. A trade buyer is extended the same protection as an ordinary member of the public as long as the goods are bought in the ordinary course of the seller's business.

[73] Ms Ifwersen also relied on Comquip's motive for selling as taking the transaction outside the ordinary course of its business. She referred me to cases in which the Canadian Courts declined to treat disposals made under financial pressure for the purpose of raising money as sales made in the ordinary course of business (for example, *MacDonald v Canadian Acceptance Corp Ltd* [1955] 5 DLR 344; *Northwest Equipment Inc v Daewoo Heavy Industries America Corp* [2002] 6 WWR 444; and *Re 547592 Alberta Ltd (Rec)* (1995) 13 PPSAC (2d) 62).

[74] On my reading of the evidence, the sale to Nicholls was not made for the primary or even the substantial purpose of raising money. The companies were not under serious financial pressure at the time; it was not until after 31 March 2004 that a decision was made to liquidate the assets. The sale took place in response to an approach from Nicholls, not as part of a planned sale of assets. Of course, the sale provided cash for a business that was suffering cash-flow difficulties, but that was an incidental benefit, not the motivation for the sale.

[75] Whichever way the transaction is viewed, it presents as a commonplace trade of the kind in which Mr Milne had been engaged for many years. I am satisfied that s 53 applies and Nicholls took the paver free of the security interest of ORIX.

Result

[76] ORIX is entitled to judgment against Mr Milne in the sum of $143,410.31 and to interest from the date of default at the rate of 14.3 per cent.

[77] ORIX's claim against Nicholls fails.

[78] Mr Milne's claim against Mr Johnson fails.

[79] Costs should follow the event on a category 2, band B basis. If the parties are unable to agree, I will consider memoranda.

Judgment entered against the first defendant.

Solicitors for ORIX: *Bell Gully* (Auckland).
Solicitors for Mr Milne: *Morrison Kent* (Auckland).
Solicitors for Nicholls: *Gascoigne Wicks* (Blenheim).
Solicitors for Mr Johnson: *Grimshaw & Co* (Auckland).

Reported by: Andrew Borrowdale, *Barrister*